

BRB No. 06-0832 BLA

FRED R. SPANGLER )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 ) DATE ISSUED: 03/27/2007  
 DONNA KAY COAL COMPANY, )  
 INCORPORATED, )  
 d/b/a MAYNARD HOGG )  
 )  
 and )  
 )  
 BITUMINOUS CASUALTY )  
 CORPORATION, )  
 c/o OLD REPUBLIC INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) ORDER

Claimant has appealed the denial of benefits on a subsequent claim. *See* 20 C.F.R. §725.309(d). The Director, Office of Workers' Compensation Programs (the Director), responds by letter, urging the Board to remand this case to the district director, because the Director did not meet his obligation to provide claimant with a complete pulmonary evaluation.

Employer has filed a Motion to Strike Director's Response Letter. Employer argues that any challenge to the sufficiency of the examination provided by the Department of Labor should have been raised before the district director or the administrative law judge. Employer contends that the Board lacks jurisdiction of this matter, absent a waiver from employer, which it does not provide. Further, employer disagrees with the assertions of claimant and the Director that the Department-sponsored

examination is incomplete. In the alternative, employer argues that if the case is remanded for a complete pulmonary evaluation, employer should be dismissed as the responsible operator. The Director responds to Employer's Motion to Strike Director's Response Letter, noting that in *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994), the Board determined that the issue of whether the Director has satisfied his obligation under Section 413(b) of the Act may be raised for the first time on appeal. Employer responds, arguing that this case is distinguishable from *Hodges*.

Upon consideration of the arguments raised, we deny employer's Motion to Strike Director's Response Letter, and we grant the Director's request for a remand of this case. The Director is statutorily mandated to provide claimant with an opportunity for a complete pulmonary evaluation in order to substantiate his claim. *See* 30 U.S.C. §923(b) ("Each miner who files a claim for benefits . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation."); *see also Hodges*, 18 BLR at 1-90. The Board has held that the Director may raise the issue of whether he has satisfied his obligation under Section 413(b) of the Act for the first time on appeal. *Hodges*, 18 BLR at 1-89-90. The Board has not wavered from its holding in *Hodges*, nor limited its application to cases in which claimant is not represented by counsel, regardless of the pleading the Director has used to request a remand of the case. We continue to follow our holding in *Hodges*. Consequently, we deny employer's Motion to Strike Director's Response Letter. Pursuant to the Director's motion, we remand the case to the district director to provide claimant with a complete pulmonary evaluation addressing all issues of entitlement, in accordance with Section 413(b) of the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *see Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*).

We also reject employer's request to be dismissed if the case is remanded for a complete pulmonary evaluation. Contrary to employer's suggestion, a remand for a complete pulmonary evaluation pursuant to Section 413(b) of the Act does not deprive employer of due process. Employer will have the opportunity to respond to any new evaluation of claimant, and employer will have the opportunity to mount a meaningful defense. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000). Further, we are not persuaded by employer's reliance on *Lester v. Peabody Coal Co.*, 22 BLR 1-184 (2002)(*en banc*) and *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002)(*en banc*), as these cases do not support employer's argument that it should be relieved of liability in this case.

Accordingly, employer's Motion to Strike Director's Response Letter is denied, and the Director's request for a remand to the district director for a complete pulmonary evaluation is granted. The administrative law judge's Decision and Order – Denial of Benefits is vacated, and this case is remanded to the district director for further proceedings.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge